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# Death Becomes the State: The Death Penalty in New York State - Past, Present and Future

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## Introduction

The death penalty is one of the oldest penalties available for the punishment of crimes. It has been utilized throughout this country since its inception. The death penalty in New York State has been through many incarnations throughout time, ranging from active use to moratoriums.[1] After years without a death penalty statute, New York enacted one in 1995.[2] In 2004, the New York State Court of Appeals ruled that the New York death penalty statute could not be applied as written because the deadlock instruction[3] was unconstitutional.[4] Since that time, New York has been without a valid death penalty statute, and the death sentences of all but one man have been commuted to life in prison.[5] This Comment focuses on the history, present and possible future of the death penalty in New York State and the fate of the sole person left on death row.

Section I outlines the history of the death penalty in New York State. The death penalty has undergone several changes as New York itself has changed. Section II details the 1995

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1. *See* Edward J. Maggio, *The Turbulent History of New York's Death Penalty*, 77 N.Y. ST. B.J. 11 (2005).

2. N.Y. CRIM. PROC. LAW § 400.27 (Consol. 2006).

3. *Id.* § 400.27(10), *invalidated by* People v. LaValle, 817 N.E.2d 341 (N.Y. 2004).

4. *LaValle*, 817 N.E.2d at 365.

5. *See* Joseph Goldstein, *Death Penalty May Be Revived by High Court*, N.Y. SUN, Nov. 17, 2006, at N.Y.1 [hereinafter Goldstein, *Death Penalty May Be Revived*].

New York death penalty statute. Section III discusses *People v. LaValle* and its impact on New York death penalty jurisprudence. Section IV looks at the aftermath of the *LaValle* decision, the actions taken in New York to renew the death penalty, and the case of *People v. Taylor*.[6] Section V contains speculation about the future of the death penalty in New York as well as views on the use of the death penalty as a form of punishment.

## I: The History of the Death Penalty in New York

New York State began utilizing the death penalty in the early colonial days. While under Dutch control, New York had a harsh death penalty.[7] However, the Dutch did not have an "organized" legal system to mete out this punishment.[8] Sometimes, if the criminal court could not determine the culprit in a particular crime, men would draw lots to determine who would be executed.[9]

The British brought to New York an organized legal system, which included capital punishment as a possible sanction.[10] Several penal law offenses carried with them the death penalty.[11] However, there was a popular practice of pardoning individuals as long as they agreed to leave the colony or enlist in the army.[12] Despite one bloody period in 1741, where eighteen white colonials and thirteen slaves were burned at the stake, the eighteenth century saw 51.7 percent of condemned defendants given some form of pardon or mercy.[13]

The creation of the United States of America led to an evolution in the legal system in New York State. In 1888, the New York State legislature passed a new capital punishment

6. People v. Taylor, 9 N.Y.3d 129 (2007).

7. Maggio, *supra* note 1, at 12.

8. *Id.* There was a legal system; however, by current standards in the United States, the drawing of lots to determine who would be put to death when the Dutch criminal court could not decide exactly who committed the crime, is not organized.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

statute that required death by electricity;[14] in so doing, New York became one of the first states to use the electric chair to execute people condemned to death, and the first state to institutionalize a formal system where the state, not local authorities, would execute individuals.[15] The statute required that those convicted of premeditated felony, depraved murders and other forms of homicide would face a mandatory death sentence.[16] William Kemmler, who had been tried, convicted and sentenced to die for the murder of his common law wife, all within the span of one week, became the first person in the United States to be executed by means of the electric chair on August 6, 1890.[17] However, this new form of execution was not as humane as was expected.[18] Although Thomas Edison personally wired the machine and prepared it for the execution, the first jolt of electricity failed to kill Mr. Kemmler, and he was forced to endure a second jolt of electricity which eventually led to his "roast[ing]" to death.[19] Until the 1930s, New York executed more prisoners than any other state.[20] Overall, New York has executed more prisoners since 1890 than any other state, and has executed the most people later proven innocent.[21]

In the 1930s, legislators amended the death penalty statute to increase the number of crimes for which a defendant could be death eligible, including the crime of kidnapping, where the victim was not produced alive by the time the trial commenced.[22] The change to allow this particular type of kidnapping was influenced by the Lindbergh kidnapping, because although New Jersey was able to attain a conviction for first degree murder without the body, New York required proof of a murder in the form of a body in order to attain a conviction.[23] Additionally,

14. *Id. See also* Michael Lumer & Nancy Tenney, *The Death Penalty in New York: An Historical Perspective*, 4 J.L. & POL'Y 81, 83-84 (1995).

15. Maggio, *supra* note 1, at 12; Lumer & Tenney, *supra* note 14, at 84.

16. Maggio, *supra* note 1, at 12.

17. Lumer & Tenney, *supra* note 14, at 85-86.

18. *See id.* at 86-87.

19. *Id.*

20. Maggio, *supra* note 1, at 12; *see also* Lumer & Tenney, *supra* note 14, at 87.

21. Lumer & Tenney, *supra* note 14, at 82.

22. Maggio, *supra* note 1, at 12; *see also* Lumer & Tenney, *supra* note 14, at 89-90.

23. Lumer & Tenney, *supra* note 14, at 90.

the amended statute allowed juries to make sentencing recommendations for a defendant convicted of a death eligible crime.[24] Despite a greater number of crimes carrying the death penalty, executions in New York decreased throughout the 1940s and 1950s.[25] From 1950 until 1962, the legislature introduced a bill to abolish the death penalty every year.[26] The New York State legislature amended the death penalty statute in 1963.[27] The statute no longer required mandatory imposition of the death penalty for premeditated killings and made the jury's sentencing recommendations binding on the court.[28] The 1963 statute provided more protection for defendants by ensuring that those under eighteen would not be subject to capital punishment. Additionally, the statute allowed judges to dismiss a jury and sentence the defendant to prison if he or she found mitigating circumstances.[29] Bifurcated trials, those in which the guilt and punishment phases of the trial are separated, were also employed through the 1963 amendments.[30] In 1963, Eddie Lee Mays became the last person executed in New York State.[31] In 1965, legislators again amended the statute limiting the death penalty to the deliberate and premeditated murder of police officers killed in the line of duty or for convicted prisoners serving a life sentence who killed a fellow inmate.[32] In 1967, the legislature again expanded the class of crimes punishable by death, including felony murder.[33]

The face of death penalty legislation changed when the Supreme Court announced its ruling in *Furman v. Georgia*.[34] The

24. Maggio, *supra* note 1, at 12.

25. *Id.*; *see also* Lumer & Tenney, *supra* note 14, at 91.

26. Lumer & Tenney, *supra* note 14, at 91-92.

27. *Id. See also* Maggio, *supra* note 1, at 13.

28. Maggio, *supra* note 1, at 13; *see also* Lumer & Tenney, *supra* note 14, at 92.

29. Maggio, *supra* note 1, at 13; *see also* Lumer & Tenney, *supra* note 14, at 92.

30. Lumer & Tenney, *supra* note 14, at 92-93.

31. Maggio, *supra* note 1, at 13; *see also* Lumer & Tenney, *supra* note 14, at 92.

32. Maggio, *supra* note 1, at 14; *see also* Lumer & Tenney, *supra* note 14, at 93-94.

33. Maggio, *supra* note 1, at 14; *see also* Lumer & Tenney, *supra* note 14, at 94.

34. 408 U.S. 238, 240 (1972) (holding that the application of the Georgia death penalty statute violates cruel and unusual punishment under the Eighth and

effect of the decision in *Furman* made unconstitutional any death penalty statute that granted jury members unregulated discretion.[35] *Furman* forced the New York Court of Appeals to rule the death penalty statute unconstitutional because it did not regulate the discretion of the jury.[36] In the wake of *Furman*, legislatures did not know how to craft their death penalty statutes to conform to the Supreme Court's opinion, resulting in a moratorium on the death penalty in New York.[37] The Supreme Court finally approved death penalty statutes in 1976.[38] From 1978 until 1994, the Governor vetoed any newly proposed death penalty legislation.[39]

## II: The 1995 New York Death Penalty Statute

After decades without a death penalty statute, the election of a new Republican Governor, George Pataki, heralded a new era in death penalty legislation in New York.[40] The New York State legislature passed death penalty legislation on March 2, 1995.[41] Governor George Pataki signed the act into law on March 7, 1995, and the statute went into effect on September 1, 1995.[42]

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Fourteenth Amendments because it was applied to minorities in a haphazard and discriminatory manner).

35. Maggio, *supra* note 1, at 14; *see also* Lumer & Tenney, *supra* note 14, at 94.

36. People v. Fitzpatrick, 300 N.E.2d 139, 145-46 (N.Y. 1973).

37. *See id.* Although the opinion did not specifically create a moratorium on the death penalty in New York, the invalidation of the New York statute, following the Supreme Court's decision in *Furman*, effectively created a moratorium on the death penalty in New York State.

38. *See* Profitt v. Florida, 428 U.S. 242, 259-60 (1976) (holding Florida statute directing the sentencing judge to weigh aggravating and mitigating factors and automatic review by state supreme court constitutional); Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) (ruling that new Georgia statute which focused the jury on the crime and the particular defendant, as well as a method for oversight, was not unconstitutional); Jurek v. Texas, 428 U.S. 262, 276 (1976) (declaring a Texas statute that provided for separate proceedings to determine guilt, and sentence in which a sentencing jury could consider mitigating factors, constitutional).

39. Maggio, *supra* note 1, at 14; *see also* Lumer & Tenney, *supra* note 14, at 96.

40. Ian Fisher, *The 1994 Election: Legislature, for Assembly and Senate, Slim Changes*, N.Y. TIMES, Nov. 14, 1994, at B6.

41. The New York Death Penalty Statute of Sept. 1, 1995 (MB) 3.

42. *Id.*

The statute is divided into fourteen different parts detailing the procedures for determining the sentence of a defendant convicted of first degree murder.[43] Subsection one provides that following a conviction for first degree murder the court must conduct a separate sentencing proceeding to determine whether to impose a sentence of life without parole or the death penalty.[44] Subsection two instructs the court to conduct the sentencing proceeding before the same jury that determined guilt except in extraordinary circumstances and a showing of good cause, including but not limited to prejudice for either party.[45] If such a showing is made, the court can discharge the jury and impanel another jury to determine the sentence.[46] Additionally, each juror is questioned to determine his/her ability to impose a death sentence.[47] If the court determines that a juror cannot make an impartial sentencing decision, that judge should discharge the juror and replace him/her with an alternate if one is available;[48] if no alternate is available, the entire jury must be discharged and a new one impaneled.[49] Subsection four allows the court, or either party, the ability to motion for a delay of the sentencing proceeding.[50] Subsection eight provides both sides with the opportunity to rebut any evidence presented at the sentencing proceeding.[51] Subsection five notes that a presentence investigation is not needed unless the court will be imposing a sentence of imprisonment.[52]

Subsections three, six and seven provide guidance on the use and definition of aggravating factors.[53] The only aggravating factors a jury may consider are those which were proven beyond a reasonable doubt at trial.[54] The aggravating factors cannot be relitigated during the sentencing proceeding.[55] Sub-

43. N.Y. CRIM. PROC. LAW § 400.27 (Consol. 2006).
44. *Id.* § 400.27(1).
45. *Id.* § 400.27(2).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* § 400.27(4).
51. *Id.* § 400.27(8).
52. *Id.* § 400.27(5).
53. *Id.* § 400.27.
54. *Id.* § 400.27(3).
55. *Id.* § 400.27(6).

section seven is divided into three different parts.[56] Part 7(a) permits the people to prove that in the ten years prior to the commission of the murder for which the defendant was convicted, the defendant was convicted of two or more specified offenses, including certain class A or class B felonies,[57] or crimes in another state that are punishable by more than one year and involve the threat or use of a deadly weapon or the attempt or infliction of serious physical injury or death.[58] This is important because the conviction of two or more of these specified offenses, if proven, constitutes an aggravating factor.[59] Part 7(b) requires that the jury unanimously find beyond a reasonable doubt any aggravating factor under subsection seven.[60] Part 7(b) allows the defendant to present evidence regarding the aggravating factor and provides each side with the opportunity for rebuttal.[61] Part 7(c) requires the people to notify the defense of their intention to offer evidence of an aggravating factor.[62]

Mitigating factors are addressed in subsections six and nine.[63] Subsection six requires that when the defendant presents the mitigating factors allowed in subsection nine, the defendant must prove those mitigating factors by a preponderance of the evidence.[64] Additionally, the people can only present evidence in rebuttal of a mitigating factor.[65] Subsection nine details the mitigating factors of which a defendant may present evidence.[66] These mitigating factors include: (a) the defendant has no prior criminal history involving use of violence towards another person; (b) the defendant was mentally retarded at the time of the crime or was mentally impaired to the extent that the defendant could not conform to the strictures of the law; (c) the defendant was under duress; (d) the defendant's participa-

56. *Id.* § 400.27(7).

57. N.Y. PENAL LAW § 70.00 (Consol. 2006) (noting that class A felonies require life imprisonment and class B felonies allow the court to fix a term that shall not exceed 25 years).

58. N.Y. CRIM. PROC. LAW § 400.27(7) (Consol. 2006).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* § 400.27.

64. *Id.* § 400.27(6).

65. *Id.*

66. *Id.* § 400.27(9).

tion was minor; (e) the defendant committed the murder under the influence of drugs or alcohol; and (f) any other circumstance about the crime or the defendant that would be relevant to mitigation.[67]

Subsection ten involves the jury instruction which the New York Court of Appeals later invalidated.[68] Subsection ten provides for summation at the end of the sentencing proceeding, which the people commence and the defendant ends.[69] Following summation, the judge instructs the jury that they may consider whether or not a sentence of death or life imprisonment without the possibility of parole should be imposed for each count of first degree murder.[70] The judge then informs the jury that they must come to a unanimous conclusion on any sentence and that failure to do so will result in the imposition of a sentence of a minimum of twenty to twenty-five years imprisonment to a maximum of life imprisonment.[71]

Subsection eleven focuses on the jury's deliberations.[72] The jury can only impose a death sentence if they unanimously find "beyond a reasonable doubt that the aggravating . . . factors substantially outweigh the mitigating . . . factors."[73] The jury must specify which aggravating and mitigating factors it considered in rendering its decision.[74] The court can direct the jury to stop deliberating on the sentence if the jury deliberated for a long period of time without coming to a unanimous decision and if the court thinks that unanimity will not result in a reasonable time period.[75] If the jury unanimously decides to sentence the defendant to death, the court must impose a death sentence.[76] However, the defendant may motion to set aside the death sentence.[77] Should the jury unanimously determine to sentence the defendant to life imprisonment, the court must im-

67. *Id.*
68. *Id.* § 400.27(10); *see* People v. LaValle, 817 N.E.2d 341 (N.Y. 2004).
69. N.Y. CRIM. PROC. LAW § 400.27(10) (Consol. 2006).
70. *Id.*
71. *Id.*
72. *Id.* § 400.27(11).
73. *Id.* § 400.27(11)(a).
74. *Id.* § 400.27(11)(b).
75. *Id.* § 400.27(11)(c). The statute does not specify how long the jury may deliberate before the court directs them to cease deliberations.
76. *Id.* § 400.27(11)(d).
77. *Id.*

pose that sentence on the defendant.[78] When the jury delivers its sentence the court must ask the jurors as a collective unit whether they concur with the sentence.[79] Both parties have the option to individually poll the jurors to ensure that they agree with the sentence announced.[80] If a juror does not agree with the sentence the jury must return to deliberations.[81] As long as no disagreements exist, the judge must discharge the jury.[82] Subsections twelve through fourteen detail the process the court must go through if the defendant establishes that he/she has a mental retardation.[83]

The new statute was not without criticism,[84] most of which focused on the subsection directing the judge to instruct the jury that should they fail to come to a unanimous decision on either death or life imprisonment, the law required the judge to sentence the defendant to a minimum of twenty to twenty-five years in prison with a maximum of life imprisonment.[85] This deadlock instruction was unique among state death penalty statutes.[86] "The Committee believes that this sentencing scheme is illogical and creates the possibility of a coerced verdict of death."[87] The complaint centers on the fact that if the jury fails to come to a unanimous decision, the judge will sentence the defendant to a third possible sentence that the jury could not even consider.[88] This raised fears that the instruction would coerce a jury to come to a unanimous decision, even if they did not truly agree, because of a belief that the alternative sentence would be too lenient since it included the possibility of parole.[89] Furthermore, critics believed that since the legislature did not directly provide the jury with the sentencing choice

78. *Id.* § 400.27(11)(e).
79. *Id.* § 400.27(11)(f).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* § 400.27(12-14).
84. *See* GERARD P. CONROY ET. AL., REPORT OF THE SPECIAL COMMITTEE ON THE DEATH PENALTY OF THE NEW YORK COUNTY LAWYER'S ASSOCIATION ON NEW YORK'S DEATH PENALTY ACT, ENACTED MARCH 7, 1995, at 22 (1996). *See also* Maggio, *supra* note 1, at 15.
85. N.Y. CRIM. PROC. LAW § 400.27(10) (Consol. 2006).
86. Maggio, *supra* note 1, at 15.
87. CONROY, *supra* note 84, at 22.
88. *Id.*
89. *Id.*

of imprisonment with the possibility of parole, the legislature must not have believed in the appropriateness of such a sentence.[90] Many believed that since most Senators probably would not consider a sentence which included the possibility of parole sufficient punishment for a murderer, the only possible purpose of allowing the judge to impose such a sentence would be to coerce the jury into coming to a unanimous verdict.[91]

The New York State Legislature was aware of the coercive danger of the statute.[92] Senator Richard Dollinger asked:

> [H]ow do you avoid the problem of a jury that is hung up on the issue of either life in prison without parole or the death penalty of putting additional pressure on the jurors, knowing that if they failed to agree they are going to face a penalty that is less than either of the two penalties that they are currently in dispute over?[93]

Senator Dale Volker expressed his feeling that the statute did not have a coercive effect.[94] Senator Dollinger wanted to know if the Senate considered providing the jury with all three options on which to deliberate.[95] Senator Volker said the Senate considered this, but they decided to let the jury decide between the most severe penalties.[96]

## III: *People v. LaValle*

The State of New York charged Stephen S. LaValle with the first degree murder of Cynthia Quinn in furtherance of first degree rape.[97] Cynthia Quinn's body was found in some woods near her home in Suffolk County covered with seventy-three screw-driver like puncture wounds and various bruises and

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90. *Id.*

91. *Id.*

92. People v. LaValle, 817 N.E.2d 341, 359 (N.Y. 2004).

93. *Id.* (quoting New York State Senate Debate, Transcripts 1912 (Mar. 6, 1995) (Statement of Senator Dollinger)).

94. *Id.* at 359-60 (citing New York State Senate Debate, Transcripts 1912 (Mar. 6, 1995) (Statement of Senator Volker)).

95. *Id.* at 360 (citing New York State Senate Debate, Transcripts 1912 (Mar. 6, 1995) (Statement of Senator Dollinger)).

96. *Id.* (citing New York State Senate Debate, Transcripts 1912 (Mar. 6, 1995) (Statement of Senator Volker)).

97. *Id.* at 344.

abrasions.[98] She had been raped.[99] On the same morning of the murder, a man who bumped into Monique Sturm's car attacked and robbed her.[100] Ms. Sturm provided a description of her attacker, but even more importantly, the police found her wallet near the scene of the murder.[101] The police suspected Mr. LaValle in the robbery of Ms. Sturm as well as an earlier attack and arrested him two days after the murder.[102] After denying any involvement in either crime he eventually admitted that he was involved in a car accident with Ms. Sturm and confessed to the murder of Cynthia Quinn.[103]

After his conviction, Mr. LaValle appealed directly to the New York Court of Appeals.[104] Mr. LaValle appealed on several different grounds, including failure to dismiss certain jurors, failure to provide new counsel, and the unconstitutionality of the deadlock instruction provided by the statute.[105] The challenge to the deadlock instruction proved the key element of this case.

The *LaValle* court noted that the New York deadlock instruction, requiring the jury to be informed that the judge would impose a third more lenient sentence if the jury could not unanimously decide on the sentence, is unique among state death penalty statutes.[106] The People contended that the New York deadlock provision was similar to a provision upheld by the New Jersey Supreme Court in *State v. Ramseur*.[107] The *LaValle* court distinguished the New Jersey provision since it was amended in 2000 and now mandated an instruction to the jury that a failure to reach a unanimous verdict would result in a sentence of life without parole.[108] The *LaValle* court compared the deadlock instruction used in this case to that mistakenly given in *Morris v. Woodford*.[109] In *Morris*, the Ninth

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 345.
102. *Id.*
103. *Id.*
104. *Id.* at 344.
105. *Id.* at 346, 348, 356.
106. *Id.* at 357.
107. *Id.* at 357 n.10 (citing State v. Ramseur, 524 A.2d 188 (N.J. 1987)).
108. *Id.*
109. *Id.* at 358 (citing Morris v. Woodford, 273 F.3d 826 (9th Cir. 2001)).

Circuit Court of Appeals held that the coercive instruction given to the jury led to the reasonable possibility that members of the jury might believe that failure to sentence the defendant to either death or life imprisonment without parole would result in a sentence of life with parole. The Ninth Circuit thus remanded the case for a new penalty phase without the impermissibly coercive instruction.[110]

The *LaValle* court cited a number of studies that found that jurors' misperceptions about the effect of prison sentences affect their determination to impose a sentence of death.[111] Jurors tend to "grossly underestimate how long capital murderers not sentenced to death usually stay in prison."[112] The "sooner jurors think a defendant will be released from prison, the more likely they are to vote for death and the more likely they are to see the defendant as dangerous."[113] A South Carolina study came to the same conclusion noting that "jurors who believe the alternative to death is a relatively short time in prison tend to sentence [the defendant] to death. Jurors who believe the alternative treatment is longer tend to sentence to life."[114] The *LaValle* court felt that the deadlock instruction encouraged the jury to sentence the defendant to death because of their fears that the defendant may be released on parole and once again pose a danger to the general population.[115] This concerned the court since the jury may not consider future dangerousness as an aggravating factor; yet it inevitably becomes part of the jury's consideration when determining a sentence.[116]

The *LaValle* court noted that the United States Supreme Court never ruled on an instruction which tells jurors that if they cannot agree on a verdict the defendant will receive a

110. *Id.* (citing *Morris*, 273 F.3d at 841).

111. *Id.* at 357-59 (citing William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999); William J. Bowers, *Symposium: The Capital Jury Project: The Capital Jury Project Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993)).

112. *Id.* (citing Bowers & Steiner, *supra* note 111, at 648).

113. *Id.* (citing Bowers & Steiner, *supra* note 111, at 703).

114. Eisenberg & Wells, *supra* note 111, at 7.

115. *LaValle*, 817 N.E.2d at 357-58.

116. *Id.* at 358.

lesser sentence than those they considered.[117] However, the Supreme Court has held that defendants are entitled to uncoerced verdicts.[118] Two Supreme Court cases provided some support for the *LaValle* court's analysis.[119] In *Simmons*, the Court held that "[t]he State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole."[120] In *Beck*, the Supreme Court invalidated the state's death penalty scheme, which did not allow the jurors to convict a defendant of a lesser included offense, because it enhanced the risk of an unwarranted conviction.[121] The Supreme Court held that the statute "interjects irrelevant considerations into the fact finding process."[122] The *LaValle* court believed that the reasoning of *Beck* applied to this case despite the fact that *Beck* involved the guilt phase of the trial.[123] The court reasoned that precluding the jury from considering a third option, yet instructing the jury that the third option would be imposed should they fail to come to a unanimous sentencing decision, improperly interjects future dangerousness into the jury's deliberations.[124] The only problem lay in that the Supreme Court in *California v. Ramos* held that "the risk of an unwarranted conviction is simply not directly translatable" to the penalty phase of a capital trial.[125] However, the California Supreme Court subsequently held the instruction to the jury at issue in *California v. Ramos*[126] unconstitutional because it was misleading and allowed the jury to consider other impermissible factors.[127] The *LaValle* court approved of the language used in *State v. White*:

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117. *Id.* at 360.

118. *Id.* (citing Lowenfield v. Phelps, 484 U.S. 231 (1988)).

119. *Id.* at 360-61 (citing Simmons v. South Carolina, 512 U.S. 154 (1994); Beck v. Alabama, 447 U.S. 625 (1980)).

120. *Id.* (citing *Simmons*, 512 U.S. at 171).

121. *Id.* (citing *Beck*, 447 U.S. at 637).

122. *Id.* (citing *Beck*, 447 U.S. at 642).

123. *Id.* at 361.

124. *Id.*

125. 463 U.S. 992, 1009 (1983).

126. *Id.* at 995-96 (instructing the jury that a life sentence without parole could be commuted by the Governor).

127. People v. Ramos, 689 P.2d 430, 444 (Cal. 1984).

> It is no more proper for a jury to conclude that death be the penalty because a life sentence may be commuted or the defendant paroled, than it would be for a trial judge in other criminal causes deliberately to impose an excessive sentence to frustrate the statutory scheme committing parole to another agency. That death should be inflicted when a life sentence is appropriate is an abhorrent thought.[128]

The *LaValle* court used the *Ramos* and *White* cases to determine the unconstitutionality of the deadlock instruction.[129] The court reasoned that the Due Process Clause of the New York State Constitution[130] required them to strike down the deadlock instruction because it created a substantial risk of coercing jurors into sentencing a defendant to death.[131]

The *LaValle* court then addressed the possibility of eliminating the instruction.[132] The court considered allowing the absence of an instruction because of the Supreme Court ruling in *Jones v. United States*.[133] In *Jones*, the defendant requested that the judge provide the jury with an instruction about the consequences of their failure to come to a unanimous decision, namely that the judge would impose a sentence of life imprisonment without the possibility of parole.[134] The Supreme Court ruled that the Eighth Amendment[135] does not require that a jury in a capital punishment case be informed of the consequences of their failure to come to a unanimous agreement.[136] The *LaValle* court declined to adopt the ruling from *Jones*, finding that the Due Process Clause of the New York State Constitution demands a higher standard than the Federal Constitution.[137] The court concluded that the absence of an instruction was no better than the current unconstitutional instruction.[138] "[T]he absence of an instruction would lead to death sentences that are based on speculation, as the Legisla-

128. State v. White, 142 A.2d 65, 76 (N.J. 1958).
129. *LaValle*, 817 N.E.2d at 361.
130. N.Y. CONST. art. I, § 6.
131. *LaValle*, 817 N.E.2d at 365.
132. *Id.* at 365-67.
133. Jones v. United States, 527 U.S. 373 (1999).
134. *Id.* at 379.
135. U.S. CONST. amend. VIII.
136. *LaValle*, 817 N.E.2d at 381.
137. *Id.* at 365-66.
138. *Id.*

ture apparently feared when it decided to prescribe the instruction."[139] Without an instruction the jury might still worry that the failure to come to a unanimous verdict would lead to a retrial, a lesser sentence or the defendant's release.[140]

The *LaValle* court noted that they were not alone in determining that a jury instruction relating to the consequences of a deadlock is required in all capital cases.[141] Three states[142] made such a determination by court rule.[143] Five states[144] made the determination through legislative enactment.[145] The *LaValle* court relied on the court rulings in Delaware, Louisiana and New Jersey.[146] In *State v. Williams*, the Louisiana Supreme Court considered the question of whether a trial judge must inform the jury that their failure to come to a unanimous decision would lead to the imposition of a sentence of life without the possibility of parole.[147] The *Williams* court determined that the failure to provide the jury with an explanatory instruction regarding the consequences of their failure to come to a unanimous decision "created a substantial risk that [death] would be inflicted in an arbitrary and capricious manner."[148] In *Whalen v. State*, the Supreme Court of Delaware determined that "failure to provide the jury with accurate, explicit instructions was a substantial denial of the defendant's constitutional rights."[149] In *State v. Ramseur*, the New Jersey Supreme Court found that there is a "constitutional imperative in a capital case that jurors be made to understand the ultimate consequences of their decision."[150]

Although the *LaValle* court found that a deadlock instruction could not be omitted, it declined to draft a deadlock instruc-

139. *Id.* at 365.

140. *See id.*

141. *Id.* at 367.

142. The three states were Delaware, Louisiana and New Jersey.

143. *LaValle*, 817 N.E.2d at 367.

144. The five states included Idaho, Missouri, Oregon, Pennsylvania and Wyoming.

145. *LaValle*, 817 N.E.2d at 367.

146. *See id.*

147. State v. Williams, 392 So. 2d 619, 633 (La. 1980).

148. *Id.* at 635.

149. Whalen v. State, 492 A.2d 552, 562 (Del. 1985).

150. State v. Ramseur, 524 A.2d 188, 283 (N.J. 1987).

tion which would meet constitutional requirements.[151] The court claimed that it did not have the power to change the statute, especially since it believed that the only way to craft a new statute would be to impose a greater sentence than that already provided for.[152] Therefore, the *LaValle* court concluded that the death penalty could not be imposed under the current statute.[153] Thus, the court vacated Mr. LaValle's death sentence and remanded the case to the lower court for resentencing.[154]

The dissent in *LaValle* believed that the deadlock instruction provision was not coercive, and even if it was it could be severed from the rest of the statute to make the statute enforceable.[155] In fact, the dissent stated that the consequences of a deadlock should not be part of the jury's considerations.[156] The dissent noted that only eight of the thirty-seven states currently utilizing capital punishment provide for an anticipatory deadlock instruction;[157] furthermore, none of these states have held the deadlock instruction necessary as a matter of due process.[158] The dissent cites *Jones*, the case which the majority decided to ignore, to support their contention that an anticipatory deadlock instruction need not be provided to the jury.[159] As for the failure to craft a new statute, the dissent contends that the majority is essentially telling the legislature that the only death penalty statute that will pass constitutional muster is one which informs the jury that a failure to reach a unanimous decision would result in a sentence of life imprisonment without the possibility of parole.[160] Therefore, the dissent states that the refusal to craft a new statute is merely illusory because the majority has essentially crafted a new statute.[161]

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151. *See LaValle,* 817 N.E.2d at 367.

152. *See id.*

153. *Id.*

154. *Id.* at 368.

155. *Id.* at 369 (R.S. Smith, J., dissenting).

156. *Id.* at 370.

157. *Id.* at 377.

158. *Id.*

159. *Id.* at 378 (citing Jones v. United States, 527 U.S. 373, 381 (1999) (holding that the Eighth Amendment does not require a capital jury to be informed of the consequences of their failure to come to a unanimous decision)).

160. *Id.* at 380.

161. *See id.*

## IV: The Aftermath of *People v. LaValle* and *People v. Taylor*

Following *LaValle*, the death sentences of convicted murderers Nicholson McCoy and Robert Schulman were overturned.[162] Only John Taylor remained on death row.[163] John Taylor's conviction occurred after the decision in *LaValle*.[164] John Taylor was convicted of the execution style murder of five employees at a Wendy's restaurant in Queens.[165] Taylor, along with his mildly retarded accomplice, bound, blindfolded, gagged and shot seven employees at the restaurant; two employees survived.[166] In Taylor's case, the judge was aware of the controversy surrounding the deadlock instruction and therefore changed his charge to the jury.[167] The judge informed the jury that if they did not reach a unanimous decision as to sentencing, the defendant would be sentenced to prison and eligible for parole in 175 years.[168] Presumably, the judge felt that this would alleviate the jury's fear that the defendant would be released quickly and pose more danger to the public.

John Taylor's execution was not a foregone conclusion merely because the judge provided different instructions to the jury. Following his conviction and sentencing, Taylor appealed to the New York Court of Appeals, the same court which decided *LaValle*.[169] After some delay, oral arguments took place in the fall of 2007.[170] The Queens prosecutor argued that the court should overturn *LaValle*.[171] The prosecutor also claimed that in cases like Taylor's, where the judge informs the jurors that it is unlikely that the defendant will ever be released from prison, any resulting death penalty convictions should be upheld because the concerns in *LaValle* have been met.[172] Taylor's attorneys argued that they believed the only way to execute

162. Maggio, *supra* note 1, at 16.
163. Goldstein, *Death Penalty May Be Revived, supra* note 5.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* For a more complete transcript of the instruction given, see People v. Taylor, 9 N.Y.3d 129, 143-145 (2007).
169. People v. Taylor, 9 N.Y.3d 129 (2007).
170. Joseph Goldstein, *Appeals Court Likely Split on Death Penalty Law*, N.Y. SUN, Sep. 11, 2007, at N.Y.2 [hereinafter Goldstein, *Appeals Court Likely Split*].
171. *Id.*
172. *Id.*

their client was to overturn *LaValle*.[173] Furthermore, Susan Salomon, an attorney for Taylor, stated that "[y]ou can't have a death penalty of one, simply for John Taylor."[174] Prior to any decision being handed down, Taylor's case was believed to be important because "[i]f the court gets past the sentencing issue, Hutter [chairman of the board of New York's Capital Defender Office] said, 'then they have to address directly . . . whether the death penalty is cruel and unusual punishment.'"[175]

When the Court of Appeals heard the case of John Taylor, the makeup of the court was different;[176] some speculated that this difference could be influential on the outcome of the case.[177] Judge George Bundy Smith, who wrote the opinion in *LaValle*,[178] retired from the court in 2006.[179] Some people argue that Judge Smith's decision in *LaValle* cost him a chance at a second fourteen year term on the Court of Appeals.[180] Governor Pataki appointed Eugene Pigott, Jr. to fill the vacancy.[181] Judge Pigott has been described as a moderate with close ties to the Republican party.[182] Judge Rosenblatt, who wrote a concurring opinion in *LaValle*, retired from the bench in late 2006.[183] Eliot Spitzer, elected Governor in November 2006, had the responsibility of appointing a judge to replace Judge Rosenblatt.[184] Governor Spitzer appointed Theodore T. Jones, Jr., who had served in Brooklyn for seventeen years to take the seat vacated by Judge Rosenblatt.[185] Chief Judge Kaye, who concurred in Judge Bundy Smith's opinion, was also up for a new term;[186] however, Governor Spitzer reappointed her to another

173. *See id.*

174. *Id.*

175. Tom Precious, *Pigott May Provide Swing Vote on 2 Major Cases*, BUFFALO NEWS, Sept. 16, 2006, at D1.

176. *See* Goldstein, *Death Penalty May Be Revived*, *supra* note 5.

177. *Id.*

178. *See* People v. LaValle, 817 N.E.2d 341, 344 (N.Y. 2004).

179. Goldstein, *Death Penalty May Be Revived*, *supra* note 5.

180. *National Headliners*, JET, Sept. 11, 2006, at Ticker Tape 14.

181. Precious, *supra* note 175.

182. *Id.*

183. Goldstein, *Death Penalty May Be Revived*, *supra* note 5.

184. *Id.*

185. Sewell Chan, *Spitzer Selects a Black Jurist for Top Court*, N.Y. TIMES, Jan. 15, 2007, at B1.

186. *See* Goldstein, *Death Penalty May Be Revived*, *supra* note 5.

term which will end in 2008 when she reaches the mandatory retirement age of 70.[187]

The Court of Appeals decided *Taylor* on October 23, 2007.[188] In an opinion written by Judge Ciparick, the plurality stood behind the idea of stare decisis and overturned Mr. Taylor's death sentence.[189] "Hence, both the legitimacy and the ability of the judiciary to function dictate that legal issues that have been addressed by a jurisdiction should not be revisited every time they arise."[190] The plurality again noted that it is the role of the legislature to redraft a statute, and that the "trial court's remaking of an unconstitutional statute into a new statute" could not be condoned.[191] The court reasoned that allowing the trial judge to craft his own statute would undermine the system of checks and balances.[192] Ultimately, the court determined that they were not wrong in *LaValle*, and that they were in the same position they were in three years ago: with a facially unconstitutional death penalty statute, which could only be changed by the legislature.

Although he joined the plurality, Judge Robert S. Smith wrote a separate concurring opinion.[193] Smith was among those who dissented in *LaValle*.[194] Judge Smith noted that there were two central holdings in *LaValle*; namely that the anticipatory deadlock instruction was unconstitutional, and that only the legislature can amend the statute.[195] No one asked the court to overturn the holding in *LaValle* regarding the unconstitutionality of the statute.[196] The court was asked by an amicus, Criminal Justice Legal Foundation, to overturn the second holding of *LaValle*, that only the legislature could redraft the statute. However, everyone on the court, except Smith, ignored

187. Anne Miller, *Chief Judge is Seeking a New Term; Judith Kaye Told Spitzer She Wants to Finish Reform Projects Says Law Journal*, THE TIMES UNION (Albany, N.Y.), Nov. 11, 2006, at A3; *Sen. Montgomery Lauds Chief Judge Judith Kaye's Reappointment to Bench*, HT MEDIA LTD., Mar. 19, 2007.

188. People v. Taylor, 9 N.Y.3d 129 (2007).

189. *Id.* at 155-56.

190. *Id.* at 148.

191. *Id.* at 153.

192. *Id.*

193. *Id.* at 156 (R.S. Smith, J., concurring).

194. *See supra* notes 155-161.

195. *Taylor*, 9 N.Y.3d at 156 (R.S. Smith, J., concurring).

196. *Id.*

that request, while Smith wrote his concurrence to address this issue.[197] Judge Smith expressed his opinion that *LaValle* was wrong in holding that the statute could not be read without the deadlock instruction and needed to be rewritten entirely.[198] However, he also believed that the harm done by this error does not justify ignoring stare decisis.[199] Furthermore, the court in *LaValle* made it perfectly clear that the legislature could redraft the statute to comply with the ruling in the case and therefore any wrong made by the error in *LaValle* could be ameliorated.[200]

The dissent noted that the instruction at issue in *Taylor* was non-coercive.[201] Judge Read noted that she still believed that *LaValle* was wrongly decided; however in *Taylor*, she accepted the holding as binding precedent under stare decisis.[202] However, she firmly dissented on the grounds that the majority in *Taylor* "convert[ed]" the closing comment in *LaValle* into a holding in this case that the death penalty statute was facially unconstitutional.[203] Judge Read stated that there was no discussion of facial constitutionality in the entire *LaValle* opinion.[204] Furthermore, the dissent argued that there is nothing in the statute that prevented the trial judge from giving the instruction required by the statute and explaining the implications to the jury.[205] Therefore, the instruction given to the defendant's jury ensured that the deadlock instruction at issue in *LaValle* was constitutionally applied to John Taylor.[206] The dissent also noted that the legislature included a severability provision in the death penalty statute, which made it clear that the legislature preferred a judicially redesigned statute over not having one at all.[207] Therefore, the dissent believed that there was no reason why John Taylor's death sentence should be vacated, when he received a non-coercive instruction seemingly al-

197. *Id.*
198. *Id.* at 157.
199. *Id.*
200. *See id.* at 160 (S.P. Read, J., dissenting).
201. *Id.*
202. *Id.* at 163-64.
203. *Id.* at 164.
204. *Id.*
205. *Id.* at 166.
206. *Id.* at 167.
207. *Id.* at 171.

lowed by the statute, merely because Stephen LaValle received a coercive instruction.[208]

The legislature did not take much action after the decision in *LaValle*.[209] In late 2005, the legislature approved an aggravated assault charge designed to deter assaults of police, peace and corrections officers.[210] However, one case has made the Legislature rethink their decision to take no action relating to the deadlock instruction.[211] The state tried Anthony Horton in 2006 for the murder of New York State Trooper Andrew J. Sperr on March 1, 2006.[212] Bryan Adams, Horton's accomplice in a bank robbery that occurred minutes before the murder, testified at Horton's trial.[213] Adams testified that Horton told him he would shoot Trooper Sperr when the Trooper approached the vehicle. People in the courtroom were really alarmed when Adams testified: "Tony said, 'Do you want to do a little bit of (prison) time or a lot of time?' He said he was going to shoot the cop. He said New York doesn't have a death penalty."[214] State Senator George H. Winner, a supporter of restoring the death penalty, said, "I found that to be some of the most astonishing testimony I've ever heard about. I've been for years listening to opponents that no empirical evidence exists that the death penalty ever acted as a deterrent to murder. This testimony is a stark rebuke to that continuing argument."[215] The jury convicted Horton of all charges filed against him, including aggravated murder, an offense carrying a mandatory sentence of life in prison without parole.[216] The murders of other law enforcement officers in the line of duty also spurred the call for renewed death penalty legislation.[217]

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208. *Id.* at 175.

209. *See The Legislature's Verdict*, STAR-GAZETTE (Elmira, N.Y.), Oct. 1, 2006, at 12A [hereinafter *The Legislature's Verdict*].

210. *Id.*

211. *See id.*

212. Jeffrey Murray, *Capital Punishment Debate Heats Up*, STAR-GAZETTE (Elmira, N.Y.), Oct. 28, 2006, at 1C.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Assembly Minority Pushes Death Penalty for Cop Killers*, HT MEDIA LTD., Mar. 29, 2006.

The State Senate proposed legislation amending section 400.27.[218] The proposed changes to section 400.27 are as follows:

> In its charge, the court must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed and whether or not a sentence to a term of imprisonment with a minimum term of between twenty and twenty five years, to be determined by the court, and a maximum term of life imprisonment should be imposed. (b) The court must instruct the jury that the jury must be unanimous with respect to the sentence to be imposed. The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of life imprisonment without parole.[219]

Under the new bill, the jury can make a sentencing determination among three different choices: (1) a sentence of life imprisonment without parole, (2) a sentence with a mandatory minimum and maximum, and (3) a sentence of death.[220] Therefore, the indeterminate sentence under which the unconstitutional deadlock provision could be imposed only by the judge, should the jury fail to reach a unanimous decision, is now an option for the jury to consider.[221] The new bill is different in that a failure of the jury to reach a unanimous verdict will result in a sentence of life imprisonment without parole.[222] The New York State Senate approved the bill by a vote of 37-23, and passed it up to the New York State Assembly.[223] However, the assembly has taken no action on that bill.[224] In fact, it seems unlikely that the assembly will approve new death penalty legislation any time soon.[225]

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218. S. S2727, 2005-2006 Reg. Sess. (N.Y. 2005).

219. *Id.*

220. *The Legislature's Verdict*, *supra* note 209.

221. *Id.*

222. *Id.*

223. *Id.*

224. Murray, *supra* note 212.

225. Goldstein, *Appeals Court Likely Split*, *supra* note 170.

## V: The Future of the Death Penalty in New York

Any speculation about the future of the death penalty in New York is just that, mere speculation. There is no way to know what the future will hold. However, the 2006 elections may provide some guidance. Democrats essentially swept all statewide elections.[226] Although Spitzer supports the death penalty for cop killers and terrorists,[227] he appointed judges to the New York Court of Appeals, like Judge Kaye, who have not shown support for the death penalty.[228] With Governor Spitzer's resignation, David Paterson became Governor of New York.[229] Unlike Governor Spitzer, Governor Paterson fully opposes the death penalty.[230]

Through the decision in *LaValle*, New York joined a couple of states in instituting a moratorium on the death penalty.[231] Thirteen states and the District of Columbia do not have the death penalty as a form of punishment.[232] Furthermore, even though the majority of states maintain death penalty legislation, the number of death sentences has decreased over the years from 300 in 1998 to 143 in 2003.[233] In April 1999, the United Nations Human Rights Commission passed the Resolution Supporting Worldwide Moratorium on Executions, which seeks to encourage countries retaining the death penalty to re-

226. Danny Hakim, *Thorny Issue Faces Spitzer in Day-After Pleasantries*, N.Y. TIMES, Nov. 9, 2006, at P5.

227. Danny Hakim, *A Gilded Path to Political Stardom, With Detours*, N.Y. TIMES, Oct. 12, 2006, at A1.

228. *See* Goldstein, *Death Penalty May Be Revived*, *supra* note 5.

229. Nicholas Confessore & Jeremy W. Peters, *A Day That Shook the State, and Hinted at a Resolution to Come*, N.Y. TIMES, Mar. 13, 2008, at B1.

230. *Id.*

231. Bob Egelko, *State's Execution Method on Trial; Judge to Decide if Injection is Constitutional - May Order Changes in Procedure, Training*, S.F. CHRON., Sept. 25, 2006, at A1.

232. Death Penalty Information Center, Death Penalty Policy State by State, http://www.deathpenaltyinfo.org/article.php?did=121&scid=11 (last visited Feb. 7, 2008) (The thirteen states include Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, New Jersey, Rhode Island, Vermont, West Virginia and Wisconsin. New York is also listed, but since New York is the subject of this article and the death penalty has not been officially repealed by the legislature, it is not included in this count.).

233. Death Penalty Information Center, Part II: History of the Death Penalty, http://www.deathpenaltyinfo.org/article.php?scid=15&did=411#CurrentConditionsinCapitalPunishment (last visited Feb. 7, 2008).

strict its use.[234] However, the United States voted against the resolution.[235]

New York's neighboring state, New Jersey, recently took action to end the institution of the death penalty in the state.[236] New Jersey had reinstated the death penalty twenty-five years ago and even built a lethal injection chamber at the New Jersey State Prison.[237] However, New Jersey never utilized the reinstated death penalty.[238] Many of the legislators who led the way for abolishing the death penalty had in fact once been staunch supporters of capital punishment.[239] Some New Jersey State Senators noted that they voted to abolish the death penalty because some families of murder victims found the trial process excruciating, and because the cost of appeals was astronomical when one considers that most people on death row merely died of old age in prison.[240]

The death penalty has been the focus of criticism on many different levels. Among the issues discussed are cost, deterrence, discrimination and innocence.[241] The death penalty costs a lot to maintain.[242] In New York, the state has spent $200 million on the death penalty system since its reinstatement in 1995.[243] Other states have also noticed exorbitant costs resulting from the death penalty.[244] Capital cases incur costs in excess of those for non-capital murder trials because different

234. *Id.*

235. *Id.*

236. Jeremy W. Peters, *In Ending Executions, Soul Searching*, N.Y. TIMES, Dec. 23, 2007, at N.J.1.

237. *Id.*

238. *Id.*

239. *Id.*

240. *See id.*

241. Death Penalty Information Center, http://deathpenaltyinfo.org (last visited Feb. 7, 2008).

242. Death Penalty Information Center, Costs of the Death Penalty, http://deathpenaltyinfo.org/article.php?did=108&scid=7#financial%20facts (last visited Feb. 7, 2008).

243. David Kaczynski, *Death Penalty Should be Left Dead and Buried in New York*, ROCHESTER DEMOCRAT & CHRON. (N.Y.), Oct. 9, 2006, at 17A [hereinafter Kaczynski, *Dead and Buried*].

244. *See Costs of the Death Penalty and Related Issues: Hearing on the Death Penalty in N.Y. Before the Assembly Standing Comms. on Codes, Judiciary, and Correction*, 2005 Leg., Reg. Sess. (N.Y. 2005) (statement of Richard C. Dieter, Esq., Executive Director of the Death Penalty Center).

stages of the trial require more planning and take longer.[245] A study in North Carolina determined that capital punishment cost $2.16 million per execution more than a system which employed life imprisonment.[246] Recently, a study revealed that the death penalty cost Florida over $51 million a year more than life imprisonment without parole.[247] In Texas, the state with the most executions, the death penalty costs $2.3 million per case, which equates to three times the cost of imprisoning someone in a cell for 40 years.[248] The death penalty costs California residents almost $100 million per execution.[249] Indiana projected that death penalty cases will cost the state 38 percent more than life without parole sentences would.[250]

Deterrence, or rather lack thereof, has been one of the major criticisms of the death penalty.[251] One of the arguments that people make in favor of the death penalty is that the threat of death will prevent people from committing murder because they fear dying. From 1990 to 2004, the murder rate has declined, while executions have increased.[252] Some people might herald this as testamentary evidence that the death penalty works as a deterrent, but a closer look at the figures shows that this is not the case.[253] The murder rate in non-death penalty states is in fact lower than that in death penalty states.[254] If the death penalty caused lower murder rates by deterring people from committing murder, then the murder rate should be lower in states with the death penalty. The gap between the murder rate in non-death penalty states and death penalty states has grown over this time period so that in 2004 there was a 42 percent difference between the murder rates of non-death penalty states and death penalty states.[255]

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245. *Id.*
246. *Id.* at 6.
247. *Id.* at 7.
248. *Id.*
249. *Id.*
250. *Id.* at 7-8.
251. *See* Death Penalty Information Center, Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates, http://deathpenaltyinfo.org./article.php?scid=12&did=168 (last visited Feb. 7, 2008).
252. *Id.*
253. *See id.*
254. *Id.*
255. *Id.*

Discrimination is one of the hot button issues involving the death penalty.[256] One of the greatest concerns has been that the death penalty is disproportionately applied to African Americans.[257] A study was conducted in Philadelphia to see the effect of race on the death penalty.[258] The study examined murders between 1983 and 1993, which were death eligible.[259] The researchers found that "blacks in Philadelphia were substantially more likely to get the death penalty than other defendants who committed similar murders."[260] African Americans were sentenced to death at a rate nearly 40 percent higher than other death eligible defendants.[261] The study found that the race of the victim also had an effect on the defendant's sentence.[262] The most likely scenario for a death sentence involved an African American defendant and a victim who was not African American.[263] The cases least likely to receive a death sentence involved African American on African American crimes.[264] This race of victim discrepancy is a major problem and seems to show a devaluation of the lives of African Americans and an increased valuation of other races, particularly whites. In many states including Florida, Oklahoma, North Carolina and Mississippi, black defendants convicted of murdering a white victim receive a death sentence at least four times more often than they would if the victim was African American.[265]

Another major problem surrounding the death penalty is the risk of executing an innocent person. Death is final; exoneration comes too late for a dead man. More than 120 death row inmates have been exonerated in recent years.[266] New York has

256. Death Penalty Information Center, Race and the Death Penalty, http://deathpenaltyinfo.org/article.php?did=105&cid=5 (last visited Feb. 7, 2008).

257. *Id.*

258. Richard C. Dieter, Esq., The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides, http://deathpenaltyinfo.org/article.php?scid=45&did=539#Study%201 (last visited Feb. 7, 2008).

259. *Id.*

260. *Id.*

261. *Id.*

262. *See id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. Kaczynski, *Dead and Buried*, *supra* note 243.

experienced its own problems with convicting innocent people.[267] Recently, Jeffrey Deskovic was exonerated after serving sixteen years in prison for a murder he did not commit.[268] In May of 2006, Douglas Warney was freed after spending a decade in prison for murder.[269] He was freed because his DNA did not match that in evidence.[270] In Warney's case, the district attorney sought the death penalty.[271] Warney was only exonerated after a new district attorney agreed to retest the DNA and found a match to someone in the criminal database.[272] Three other men have also been exonerated in New York since December 2005.[273]

## VI: Conclusion

The future of the death penalty in New York remains uncertain. The New York Court of Appeals skirted the issue of the constitutionality of the death penalty by relying on stare decisis to decide the case of John Taylor. They did note that the reinstitution of the death penalty will not occur unless, and until, the New York State Legislature takes some action to change the statute previously declared unconstitutional in *LaValle*. If the legislature takes no action, the moratorium that the New York Court of Appeals instituted by their decision in *LaValle* will continue. The decision by New Jersey to eradicate the death penalty as a form of punishment in their state may have some effect on New York. However it would be mere speculation to contemplate what effect the actions taken by New Jersey will have on New York. Until the legislature takes some action, the death penalty in New York remains in limbo.

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267. *See id. See also* David Kaczynski, *New York's Death Penalty Deserves to Die*, POST-STANDARD (Syracuse, N.Y.), Oct. 5, 2006, at A13 [hereinafter Kaczynski, *Death Penalty Deserves to Die*]; Laura Porter, *Story Makes Case Against Death Penalty*, J. NEWS (Westchester Cty., N.Y.), Sept. 24, 2006, at 4B.

268. Kaczynski, *Death Penalty Deserves to Die*, *supra* note 267.

269. Porter, *supra* note 265.

270. *Id.*

271. *Id.*

272. *Id.*; Kaczynski, *Death Penalty Deserves to Die*, *supra* note 267.

273. Kaczynski, *Death Penalty Deserves to Die*, *supra* note 267.